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IN THE

# Supreme Court of the United States

OCTOBER TERM—1959

No. 592

CHARLES H. GRIFFITHS, Trustee in Reorganization of GENERAL STORES CORPORATION,

Petitioner,

*against*

LEWIS J. RUSKIN, Collateral Trustee,

Respondent.

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Two principal issues raised by the respondent's brief in opposition to the Reorganization Trustee's petition for Cross-Writ of Certiorari are:

1. Whether said petition for cross-writ was timely filed and

2. Whether the Court of Appeals was correct on the merits and applied equitable considerations in reaching its determination.

### I

### Jurisdiction

Section 2101(c) of 28 U.S.C. provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil

> action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

To the same effect regarding extensions of time, see Rule 22 of the Rules of this Court.

While the need for finality requires some time to be specified as the ultimate limit within which a petition may be filed, the last sentence of that subsection makes it evident that there is no public policy consideration which prevents any extension of time beyond ninety days. In fact, one hundred and fifty days is fixed as the outside limit. The words of the section contain no restriction on the number of parties for whom such an extension may be granted.

It is not disputed that if the respondent herein had not applied for an extension of time within which to file a petition for certiorari, the filing of this petition for cross-writ would not be timely. The cases cited by the respondent on page 3 of his brief in opposition stand for the general proposition that a petition not filed within the prescribed time can not be heard. That rule is conceded. However, the issue in this case is whether the order by Mr. Justice Harlan extending the time for filing on the application of the Collateral Trustee, extended the time of the Reorganization Trustee as well to file a petition for certiorari.

The order of the Court of Appeals in the instant case was entered on August 26, 1959. On November 24, 1959 an application for an extension of time was made by counsel for the Collateral Trustee to Mr. Justice Harlan. This application was within the ninety day period prescribed

by the statute. By order dated November 26, 1959 Mr. Justice Harlan signed an order which provided:

> "Upon consideration of the application of counsel for the Petitioner, it is
>
> ORDERED, that the time for filing petition for Writ of Certiorari in the above entitled cause be, and the same is hereby, extended to and including December 15, 1959."

The said order does not limit the parties for whom the time has been extended. It seems clear from the order itself that there was a general extension of the period to and including December 15, 1959. The petition for a cross-writ was duly filed by counsel for the Reorganization Trustee with the Clerk of this Court on December 15, 1959.

The respondent cited no authority in his brief in opposition for his proposition that the extension is not available to petitioner (p. 3). He treats the fact that the clerk gave individual docket numbers to his petition (569) and to the instant petition for a cross-writ (592) as two separate proceedings. However, Rule 21 of the Rules of this Court provides in part:

> "5. A party seeking a cross-writ of certiorari to review in this Court the same judgment need not file any record additional to that filed by the petitioner."

Thus it seems clear that since the same judgment of the Court of Appeals is sought to be reviewed, under the Rules of this Court it is the same proceeding or cause.

A fair reading of Rule 34 of the Rules of this Court entitled "Computation and Enlargement of Time" does not support the position asserted by respondent in his opposition brief (p. 4). In fact the provision of subsection 4 of Rule 34 of said Rules requiring that notice of

any extension granted be given by the applicant to all other parties to the proceeding, would appear to have no significance unless the order extended the time of all other parties to file a petition for certiorari also.

Research of the decisions of this Court reveals no case decided on this question. The case of *Farrar* v. *Churchill*, 135 U. S. 609, cited by respondent is not applicable in this case. There, on September 2, 1885 the District Judge filed an opinion dismissing the bill and the cross-bill. On December 1, 1885 an appeal was duly taken by the complainant. On October 31, 1887 the defendants filed a petition for cross-appeal. The cross-appeal was dismissed as not being within the then permitted two year period. The Reorganization Trustee concedes the correctness of that holding but submits it is not applicable to the instant case where there was a valid extension of time for filing within which the petition was filed.

Although it is not directly involved in this case it may be helpful on the question of policy to be established by this Court to refer to Section 578a of the New York Civil Practice Act which provides as follows:

> "Time to Appeal extended in certain cases. In any action or proceeding where an appeal is taken the party upon whom the notice of appeal is served must serve a notice of appeal within ten days after such service or within the time otherwise provided by law, whichever is longer.
>
> A third party defendant or subsequent party plaintiff who is served with a notice of appeal by the party who brought him into the action must serve a notice of appeal within ten days after such service or within the time otherwise provided by law, whichever is longer."

This section was originally enacted and subsequently amended at the suggestion of the Judicial Conference of

the State of New York to avoid the filing of unnecessary notices of appeal for the sake of protecting a party's position.

As the eighteenth annual report of the Judicial Conference of the State of New York noted, statistics are impossible to compile regarding the savings of appellate court's time on appeals which are taken for the purpose of protecting a position rather than because of real interest in a determination of the merits, but it is self-evident that parties who feel that they have everything to gain and nothing to lose by asking for an extension of time which can only accrue to their benefit may reconsider if they realize that any extension given will also inure to the benefit of the other party to the proceeding. New Jersey has a similar provision with respect to cross appeals. N.J.R.R. 1:3-2.

In the instant case the petition for extension of time was filed by Chicago counsel for the Collateral Trustee two days before the ninety day period expired. Notice of the ex parte application was not received by the attorney for the Reorganization Trustee until November 27, 1959, after the ninety day period expired and in fact after the order granting the extension was signed. It is only fair and equitable to give the Reorganization Trustee the same extension of time to file a petition for certiorari.

## II

## Refutation of Argument on the Merits

With respect to the cases cited at page 10 of respondent's brief in opposition:

The case of *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, merely relates to the provability of claims in ordinary bankruptcy proceedings. It has no relation to the public policy questions raised by petitioner in this proceeding. In fact this Court in that

case further on page 591 stated:

> "Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in the bankrupt estates, while the bankrupts themselves, as a necessary corrollary, were left still subject to actions for non-performance in the future, although without the property or credit often necessary to enable them to perform."

The case of *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, involved provability of rent claims in a proceeding not under the Bankruptcy Act, and *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307, involved provability of rent claims in a proceeding under the Bankruptcy Act prior to 1932.

With respect to points II and IV of respondent's brief (pp. 11-13 and 14-15):

The Court of Appeals did not invoke equitable considerations in reversing the District Court on the question of additional interest, but decided that if the debtor is solvent, the contract provisions govern, regardless of the equities. The Court of Appeals did not discuss the grounds enumerated by the District Court as the basis of its decision, but made the gratuitous statement (Pet. p. 71):

> "Undoubtedly the debtor filed its petition under Chapter XI because it believed it beneficial to itself to do so, and in a case such as this, where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act."

See point 1 (c) of the petition for cross-writ of certiorari, for a full discussion of the facts.

With respect to point III of Respondent's brief (pp. 13-14):

Since the sole distinction of the *Vanston* case made by the Court of Appeals was that in the instant case the debtor was solvent, the issue is of great importance and adequate references to the facts will be given in the brief and argument if the petition for cross-writ is granted. It should not be dealt with summarily.

All that point V (p. 15) reveals is that this is the first case which has directly raised the questions involved. This Court need not wait for a conflict of decisions to arise in the various Courts of Appeal so long as the decision below was in conflict with the decision of this Court.

With respect to point VI of the respondent's brief (pp. 16-17) the questions raised in the petition for cross-writ are not abstract and irrelevant. It seems particularly pertinent that if the *Vanston* case is distinguishable on the question of solvency, to determine why the Collateral Trustee is not entitled to interest on interest in this case, since the Collateral Agreement expressly provided therefor.

## III

## CONCLUSION

**The petition for cross-writ of certiorari was timely filed and should be granted.**

Dated: White Plains, New York, January 15, 1960.

Respectfully submitted,

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Of Counsel:

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